OCTOBER TERM, 1878.

No. 1[illegible]

I. H. ADAMS, PLAINTIFF IN ERROR,

vs.

J. M. CHURCH, ADMINISTRATOR OF R. M. STEEL, DECEASED, DEFENDANT IN ERROR.

JOSEPH SIMON,

Attorney for Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE STATE OF OREGON FOR MARION COUNTY.

FILED [illegible]

(18,752)

16111

IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

No 169.

I. H. ADAMS,
Plaintiff in Error,
vs.
J. M. CHURCH, Administrator of R. M. Steel, Deceased,
Defendant in Error.
18,752

Brief of Defendant in Error.

STATEMENT OF THE CASE.

This is a writ of error to the Circuit Court of the State of Oregon for Malheur County, *to review a decree rendered by the Supreme Court of Oregon*, and entered pursuant to its direction, upon the journal of said Circuit Court of Malheur county, decreeing the partnership firm of Steel & Adams to be the equitable owner of the W. ½ of S. E. ¼ and E. ½ of S. W. ¼ Sec. 24 T. 18 S., R. 45 E., W. M., situated in Malheur County, Oregon.

The suit was commenced by R. M. Steel in his lifetime against I. H. Adams for a dissolution and settlement of the partnership relations theretofore existing between them, and involved a large amount of assets and liabilities. The complaint also prayed for an injunction and the appointment of a

receiver. Upon the death of Steel his administrator, J. M. Church, was substituted as plaintiff in the suit.

The Circuit Court of Malheur County issued an injunction order and appointed a receiver to take charge of the partnership assets, and proceeded to hear and determine the issues embraced in the suit, dissolved the partnership, provided for the payment of its debts and divided the remaining assets between the parties according to their respective rights therein. The Plaintiff Steel contended that among the assets of the partnership was the tract of land above described and involved in the controversy in this Court. This tract of land had been acquired by the Defendant Adams under the Timber Culture Act and as insisted by Steel sold and contracted to be conveyed by Adams to said partnership. The Defendant Adams disputed this contention on the part of Steel and claimed that the land was his individual property and that he had neither sold the land to nor contracted to sell it to the partnership.

The Circuit Court of Malheur County, upon the evidence submitted, determined the land to be the individual property of the Defendant Adams and found that Adams had neither sold nor contracted to sell the same to the partnership, and also found that he had received no consideration for any such sale.

The Plaintiff Steel being dissatisfied with the decree of the Circuit Court generally, removed said cause by appeal to the Supreme Court of the State.

Upon such appeal a final decree was rendered substantially affirming the partnership settlement as decreed by the Circuit Court, but the decree of the lower Court concerning the Timber Culture land was reversed, the Supreme Court decreeing the land to be partnership property and finding that the same had been sold by Defendant Adams to the partnership and that he, Adams, had received full consideration upon such sale.

The entire evidence, as well as the record of the case, being in the Supreme Court and remaining there permanently, in accordance with the statute regulating appeals in equity cases, a final decree was rendered by the Supreme Court determining all the issues involved in the case. This decree so rendered by the Supreme Court and embraced in a mandate was then forwarded to the clerk of the Circuit Court of Malheur County and thereafter entered on the journal of the Circuit Court by order of that Court but in pursuance of the direction of the Supreme Court and in accordance with its decree—the decree so entered on the journal of the Circuit Court being the identical decree, word for word, as rendered by the Supreme Court.

All the matters and issues involved in the litigation between the parties to this suit have been settled and acquiesced in, other than the rights of the parties to the W. ½ of S. E. ¼ and E. ½ of S. W. ¼ Sec. 24 T. 18 S., R. 45 E.

The only contention made by the Defendant Adams in his pleadings and upon the hearing in the Circuit Court as to this tract of land was that he at no time undertook to sell or convey the same to the partnership and that he had received no consideration for the sale thereof. The point is now made that under the Timber Culture Act, Adams before making his final proof could not sell or contract to convey this land to the partnership, and any contract made by him to that effect is invalid and will not be enforced by the Courts, and now relying upon this contention he seeks a reversal of the decree rendered in the State Court.

At the outset we respectfully submit to the Court that there are two insuperable reasons why this Court cannot consider the merits of this case and must dismiss the writ of error.

First: The writ of error is directed to the wrong court. It is not directed to the court rendering the decree sought to be reviewed, nor to the highest court of the state having jurisdiction to render the decree complained of.

Second: There was no Federal question raised or relied upon in the Court below and no right, title, privilege or immunity specially set up or claimed by the Defendant Adams.

FIRST.

The jurisdiction of the Supreme Court to issue writs of error to the State Courts is derived under Sec. 709 of the Revised Statutes. It can only issue to the highest court of law or equity of the state having jurisdiction to render the decision complained of. While this need not necessarily be the highest court of law or equity in the state, yet the writ can only issue to the court which rendered the final judgment or decree and from which there can be no further appeal or review in the courts of the state; that is, the judgment to be examined must be that of the highest court of the state having cognizance of the case and having possession of the record and having authority to execute its judgment. The effect of the writ of error is simply to bring the record into the appellate court and submit the judgment of the inferior tribunal to re-examination. The writ operates upon the court having the record and not upon the parties.

Cohens vs. Virginia, 6 Wheat. 264, 410.

Suydam vs. Williamson, 20 How. 437.

The writ or error should have been directed to the Supreme Court of Oregon and not to the Circuit Court of Malheur County. The Supreme Court of Oregon is the highest court in that state and appeals from the several Circuit Courts of the state are taken to the Supreme Court. In Oregon the distinction is maintained between a judgment recovered in an action at law and a decree rendered in a suit in equity. Upon an appeal from a decree the suit is tried anew upon the transcript and evidence acompanying it. The whole case is removed to the Supreme Court, and the original testimony, depositions

and other papers containing the evidence heard or offered on the trial in the Circuit Court are filed in the Supreme Court and remain as a permanent record in that court. The Supreme Court renders a final decree in an equity case, settling the rights of the parties and terminating the litigation, and remitting the cause by mandate to the Circuit Court, upon the receipt of which mandate by the clerk, a decree is entered in the journal and docketed in pursuance of the direction of the appellate court in like manner and with like effect as if the same was given in the court below.

Secs. 543, 546 and 541, Sub. 2, Hill's Oregon Code.

The decree entered in the Circuit Court in obedience to the mandate of the Supreme Court is not the decree of the Circuit Court but is the decree of the appellate court.

Apex Trans. Co. vs. Garbade, 32 Ore. 593.

The writ of error must be directed to the court which holds the proceedings as part of its records and exercises judicial power over them.

Hunt vs. Palao, 4 How. 589.

Atherton vs. Fowler, 91 U. S. 143.

In the case at bar the testimony, depositions, original papers and record, remain with the appellate court, the decree rendered is that of the appellate court, and the only province of the Circuit Court is the execution of the decree rendered by the Supreme Court.

The Circuit Court to which the writ of error was directed has neither possession nor control over the testimony, depositions, original papers or record. These have all been removed to and constitute a permanent record in the Supreme Court, and no writ of error to the Circuit Court will bring to this court such testimony, depositions, papers, etc., and with-

out which this court cannot proceed to hear and determine this controversy.

An inspection of the Transcript of Record discloses that the testimony, depositions and evidence upon which this suit was heard and determined in the State Court, and without which the merits of this controversy cannot be passed on by this Court, has not been transmitted to or filed in this Court, and the reason why the same was not transmitted to this Court is that such testimony, depositions and evidence no longer remains with said Circuit Court but upon appeal to the Supreme Court of the state was transmitted to and became part of the permanent record of this case in such court.

The litigation between the parties, on the merits was completely terminated by the decree of the Supreme Court and there remained nothing for the Circuit Court of Malheur County to do, but to execute the decree of the Supreme Court. As the Circuit Court renders no final decree in the case, only enters upon its journal the decree so rendered by the Supreme Court and enforces the same in pursuance of the direction of that court, the writ of error was improperly directed to the Circuit Court of Malheur County and should be dismissed.

Atherton vs. Fowler, 91 U. S. 143.

Polleys vs. Black R. I. Co., 113 U. S. 81.

Underwood vs. McVeigh, 131 U. S. Appendix CXIX.

Mower vs. Fletcher, 114 U. S. 127.

A judgment of an inferior state court, entered after reversal by the highest court of the state of a previous judgment and the remand of the case for further proceedings, cannot be directly reviewed by the United States Supreme Court, although it involves a Federal question, and even though the State Supreme Court, if a second appeal were taken, would necessarily affirm the judgment on the ground that the question

involved was decided on the former appeal. Before the party complaining can have the judgment so reviewed he must appeal to the highest court of the state.

Great Western Tel. Co. vs. Burnham, 162 U. S. 339.

There are some cases in which writs of error may be directed to a subordinate court. Where the record is removed from the Supreme Court of the state and remitted to an inferior court which there renders a final decree then the United States Supreme Court will direct its writ of error to the subordinate court. That is, if the Supreme Court of the state without *retaining a copy remits the entire record* to the inferior court with instructions to enter a final judgment in the case, the writ of error may be directed to the inferior court, but where the record remains in the Supreme Court, as it does in Oregon, then the writ of error can only be directed to the Supreme Court of the state.

Polleys vs. Black R. I. Co., 113 U. S. 81.

Lee vs. Johnson, 116 U. S. 48-9.

Judge Clifford's dissenting opinion in Underwood vs. McVeigh, 131 U. S. Appendix CXIX.

A case analogous in principle and practically deciding the point relied upon by us is Atherton vs. Fowler, 91 U. S. 143. In that case a judgment was rendered by one of the District Courts of the State of California and upon appeal to the Supreme Court of the state the judgment was reversed and remanded with direction to the lower court to try the case anew unless the defendants should consent to the modification thereof suggested by the appellate court. The defendants filed their written consent to such modification and the judgment of the District Court was accordingly modified. Upon a motion to dismiss the writ of error which had been sued out in this court and directed to the Supreme Court of California, it was held by this court that the judgment of the Supreme Court of Cal-

ifornia was the final judgment in the suit within the meaning of the act of Congress, and that the writ of error was properly directed to the Supreme Court. The reversal and modification of the judgment of the court below did not permit further proceedings in the District Court if the defendants consented to the modification directed as to the amount of damages. Such consent having been given, the judgment of the court below was the judgment which the Supreme Court directed that court to enter and carry into execution. The litigation was ended by the decision of the Supreme Court and no discretion left to the lower court, if the required consent was given. There is no difference in principle between that case and the case at bar and seems to us to be decisive of the point raised by us that the writ of error in this cause was improperly directed to the Circuit Court of Malheur County.

That the decree rendered by the Supreme Court in an equity suit and remitted by mandate to the Circuit Court for entry upon its journal is the final decree of the Supreme Court and not the decree of the Circuit Court will be apparent from an examination of the statutes of Oregon upon the subject of appeals. Only in exceptional and extremely rare cases will a suit in equity be remanded to the Circuit Court for further consideration. As was said in the case of Robson vs. Hamilton, 41 Oregon 246: "Suits in equity are tried anew on appeal and a final decree is usually rendered in this court and a cause should not be remanded to the lower court for further consideration unless necessity demands it."

But the precise question involved here was determined by the Supreme Court of Oregon in Apex Trans. Co. vs. Garbade, 32 Ore., 593, wherein, it is held that the judgment entered in the Circuit Court in obedience to the mandate of the Supreme Court is not the judgment of the Circuit Court but is practically the judgment of the appellate court.

We further submit that counsel for the plaintiff in error apparently believe that it is the decree of the Supreme Court

of Oregon and not of the Circuit Court of Malheur County that should be reversed because in the assignment of errors filed in this court the only errors complained of are errors of the Supreme Court of Oregon and the prayer is for a reversal of the decree of that court.

Transcript of Record, p. 46-7.

This furnishes an additional argument for dismissing the writ of error as improperly directed to the Circuit Court of Malheur County.

SECOND.

The jurisdiction of the Supreme Court is asserted under the third of the classes of cases enumerated in Sec. 709 R. S., and it is thoroughly well settled that in order to maintain it, the right, title, privilege or immunity relied on must not only be specially set up or claimed, but this must be done at the proper time and in the proper way. The proper time is in the trial court and the proper way is by appropriate pleading, or being made part of the record, showing that the claim was presented to the court.

The Federal question that plaintiff in error (Defendant Adams) now seeks to inject into this case, namely, that under the Timber Culture Act he could not lawfully sell the land before completing his final proof, was never presented to the State Court. The point he now makes must have been relied upon by him and called to the attention of the court below and a decision rendered against him before this court, will consider the same. The point was neither made nor relied on in the State Court. The only thing akin thereto is the *argument* made in the Supreme Court of Oregon that the contract of Adams to sell the land to the partnership is void as against public policy. This is not setting up or claiming a right, title, privilege or immunity under a statute of the United States.

Jurisdiction cannot arise from inference but only from averments so distinct and positive as to prove beyond question that the party intended to assert a Federal right.

Mutual Life Etc. vs. McGrew, 188 U. S. 291.

Beals vs. Cone, 188 U. S. 184.

Kipley vs. Illinois, 170 U. S. 182.

N. Y. vs. Woodruff, 153 U. S. 689.

Oxley vs. Butler, 166 U. S. 648.

Levy vs. San Francisco, 167 U. S. 175.

Capital Etc. vs. Cadiz, 172 U. S. 425.

It is apparent from an inspection of the pleadings in this case as well as by reference to the findings of the trial court that the defendant set up no right, title, privilege, or immunity under a statute of the United States, the decision of which was adverse to him in that particular. The defendant neither in his answer nor upon the hearing relied upon the claim now made that the Timber Culture Act inhibited a sale of the land prior to making his final proof, but he resisted the plaintiff's contention that the land was partnership property upon the sole ground that he had not sold or contracted to sell the same to the firm, and that he had received no consideration therefor.

It has been repeatedly held that to sustain a writ of error from the Supreme Court something more must appear than that the parties claim title under an act of Congress.

DeLamar Etc. vs. Nesbitt, 177 U. S. 523.

Blackburn vs. Portland, Etc., 175 U. S. 571.

Gold W. Co. vs. Keyes, 96 U. S. 199.

McStay vs. Friedman, 92 U. S. 723.

The statute must be specially set up by the party and the decision must have been against the claim.

Montgomery vs. Harnandez, 12 Wheat. 129.

The right on which the party relies must have been called to the attention of the court below in some way and the decision of that court must have been against the right claimed.

Maxwell vs. Newbold, 18 How. 511.
Haywood vs. Denny, 158 U. S. 180.
Miller vs. Cornwall, 168 U. S. 131.
Union M. I. Co. vs. Kirchoff, 169 U. S. 103.

BRIEF ON THE MERITS.

It is contended on the part of the Defendant Adams that the Timber Culture Act prohibits the sale by an entryman of the land entered prior to making his final proof. We can find no such provision in the law. The entryman is required to make an affidavit to the effect that he made his application in good faith and not for the purpose of speculation and that he intends to hold and cultivate the land. There is nothing in the act which inhibits the sale of the land after the entryman has complied with the law and completed his entry. No one contends that Adams did not make his application in good faith or that his purpose was otherwise than to hold and cultivate the land. There is nothing in the case to indicate that his entry was made for the purpose of speculation. After making his entry and complying with the law in good faith and without any previous intention or purpose so to do, Adams contracted to sell to the partnership firm of Steel & Adams the land in question and this under the law he had the absolute right to do. As was said by the Supreme Court of Oregon in construing this provision of the act, "We do not understand this provision to inhibit the Timber Culture claimant who has made his entry in good faith from contracting to sell his claim prior to the final proof and the law seems to be so interpreted by the Land Department of the United States.

Sims vs. Bruse, 4 L. D. 369.
U. S. vs. Read, 5 L. D. 313."

And as sustaining this view of the law in analogous cases, see

Arnold vs. Christy, 33 Pac. Rep. 619.

Palmer vs. Marsh, 24 N. W. Rep. 374.

Richards vs. Crews, 11 Oregon 501.

Hyde vs. Holland, 18 Or. 337.

Orr vs. Stewart, 67 Cal. 275.

Lang vs. Morey, 40 Minn. 396.

Upon the question of fact, as to whether Adams contracted to sell to the partnership of Steel and Adams and received the consideration, for the Timber Culture tract, this Court is concluded by the findings of the Supreme Court of Oregon.

It has been repeatedly held, on error to a state court in a chancery case (as also in a case at law) when the facts are found by the court below, that the Supreme Court is concluded by such findings.

Egan vs. Hart, 165 U. S. 188.

Dower vs. Richards, 151 U. S. 658.

Bartlett vs. Lockwood, 160 U. S. 357.

Stanley vs. Schwalby, 162 U. S. 255.

As the writ of error was directed to the wrong court, and also because there was no Federal question raised or relied upon in the court below, the writ of error should be dismissed. Should this court, however, see proper to consider the case upon its merits, we respectfully submit that the decree of the Supreme Court of Oregon should be affirmed.

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